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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GARNIK SAHAKIAN, Defendant and Appellant.	B237362 (Los Angeles County Super. Ct. No. BA384787)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Garnik Sahakian appeals from the judgment following his convictions for assault with a deadly weapon and mayhem. He contends that, following his request for substitute appointed counsel, the trial court failed to inquire as to the bases for his claim of ineffective assistance of his trial counsel. Because we find that any error was harmless beyond a reasonable doubt, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Charges

Sahakian was charged with assault with a deadly weapon (§ 245, subd. (a)(1)) and mayhem (§ 203).[1] It was alleged that he personally inflicted great bodily injury during the assault (§ 12022.7, subd. (a)) and used a deadly weapon in the commission of the mayhem (§ 12022, subd. (b)(1)). It was further alleged that Sahakian had eight prior convictions for which he served prison terms. (§ 667.5, subd. (b).)

Sahakian pled not guilty and denied the special allegations, and the case proceeded to jury trial, with Sahakian waiving jury trial on the prior prison term allegations.

Evidence at Trial

A. *Prosecution Evidence*

1. *Jose Lopez Testimony*

The evening of May 23, 2011, Jose Lopez was at Michelle's Donut House in Hollywood, drinking coffee. He noticed three Armenian men standing outside,

[1] All statutory references are to the Penal Code.

arguing. While they were arguing, two Latino men parked in front of the doughnut shop and entered. As the two men ordered and paid for coffee at the counter, one of the Armenian men, whom Lopez identified in court as Sahakian, entered the shop and spoke to one of the men at the counter, a man Lopez later learned was named Oseas Chevez. Sahakian asked Chevez, "What are you looking at?" When Chevez did not respond, Sahakian lunged at him. Chevez pushed him away and walked backwards, holding his hands up at shoulder level, with his palms outward. Sahakian threw punches at Chevez and then pulled a knife from his pants pocket and opened the blade. Chevez backed away from him into a wall, looking frightened. Sahakian continued coming towards Chevez with the knife raised in his hand and pointed at Chevez, and then cut him using an overhand downward slashing motion.

Lopez, who works as a security guard, went out to his car to get handcuffs. Sahakian came outside the shop, still holding the knife. Lopez stopped him and told him he was not leaving until the police arrived. Sahakian walked around the area outside the shop, holding the knife, until the police arrived and took the knife from him. Although Sahakian had a cast on his ankle, he did not have any trouble walking and was not using crutches.

2. *Rene Ramos Testimony*

Chevez's roommate and friend, Rene Ramos, testified that he and Chevez went to the doughnut shop to get some coffee. As they were ordering, Ramos heard a loud thud as if someone had hit the wall hard. Ramos turned his head to look towards the noise and a man (whom Ramos identified in court as Sahakian) said something to Chevez. Chevez responded, but Ramos did not understand what he said. Then Sahakian came towards Chevez and Ramos, yelling loudly at them,

and lunged at Chevez, punching him in the face. Chevez pushed Sahakian back, trying to block his punch. Ramos tried to separate then, and Chevez ran to the back of the store, but Sahakian pushed Ramos away, took a knife from his pocket and swung the blade at Chevez repeatedly, while Chevez tried to fend him off and cover his face. Ramos saw that Chevez's face had been cut. Ramos grabbed Sahakian's arm and he and another man took Sahakian outside. Sahakian walked away like nothing had happened, with the knife still in his hand. Ramos testified that Sahakian did not appear to have difficulty walking.

3. *Oseas Chevez Testimony*

The victim, Chevez, testified that he and his roommate Ramos were ordering coffee in the doughnut shop when he heard a loud noise at the door. The noise startled him, and he looked back at the door. He saw Sahakian standing in the doorway. Sahakian said, "What are you looking at?" Chevez did not respond. Then Sahakian said loudly, "Que pasa," Spanish for "What's happening," and Chevez responded, "Nada," which means "Nothing." Sahakian moved quickly towards Chevez and tried to punch him in the face. Chevez moved backwards, and Sahakian kicked him in the stomach. Chevez pushed Sahakian and then backed away. Sahakian pursued him with a knife raised in his hand, jabbing at his stomach and chest with the knife. Chevez, with his back against the wall, tried to shield his body with his arms, and Sahakian cut two holes in his sweater and scratched his wrist while swinging the knife at him, and then cut his face. The cut went from the center of his nose to his lip. Ramos then grabbed Sahakian's arm and Sahakian went outside with the knife in his hand.

4. *Officer Nathan San Nicolas*

Officer Nathan San Nicolas testified that he escorted Sahakian to jail from the scene and, although Sahakian had some sort of cast or boot on one foot, he did not need assistance walking and was not using crutches.

B. *Defense Evidence*

Sahakian was the only defense witness called. He testified that on the evening in question, he approached the doughnut shop with two friends, but they did not want anything, so he said goodbye and went into the shop by himself. They had all come from Shakey's Restaurant, where he had pizza and two beers, but he denied he was drunk. Sahakian testified he had a broken ankle and a cast on his foot at the time, and was using crutches. He had trouble getting through the shop door, which slammed behind him, making a loud noise. A man paying for coffee at the counter (Chevez) turned around to look, and stared at Sahakian for approximately one minute with an angry look on his face. Sahakian testified that he gave the man a little smile and said, "What's happening?" When the man did not respond, Sahakian repeated the question in Spanish, but the man just continued to stare at him. He began to ask "Que pasa," again, but before he could finish, the man hit him in the forehead. Sahakian lost his balance and fell down, and he grabbed the counter and stood up, leaving his crutches on the floor.

There were many "Hispanic voices" around him and he heard someone telling Chevez in Spanish to calm down. Chevez continued to stare at him with an aggressive expression, and was pushing people aside to try to come towards him again. Sahakian could not tell if Chevez was there alone or if he was there with some of the other Spanish-speaking people in the shop. These people were trying to calm Chevez down. No one could calm him, and Sahakian was afraid. He

reached into his pocket for his small pocket knife and opened it, and held it straight out in Chevez's direction to show that he had a knife and Chevez should not come at him. Chevez continued to push people aside, and must not have seen the knife, because he came straight at Sahakian and ran into the blade. Sahakian never moved from his spot by the counter and did not move his hand holding the knife. When Chevez ran into the knife, he jerked his head up, which must have caused the cut extending from his nose down to his lip.

Sahakian's friend came into the shop, having heard the noise and seen people run out. He took the knife out of Sahakian's hand and escorted him outside, where they waited until the police arrived. He said he asked the police for his crutches that were still in the shop, but no one got them for him. He denied that he kicked Chevez and said it would have been impossible given the cast on his foot.

C. *Rebuttal Evidence*

Officer Raymond Flores, the arresting officer at the scene, testified that Sahakian told him he had not done anything and had not had an argument with anybody. Officer Flores asked him if he had a knife, and he said no. He never claimed that he was defending himself. Sahakian told Officer Flores that he had consumed two beers, but given that his face was very red and his speech very slurred, Officer Flores believed he had consumed more than two beers.

Verdicts and Sentencing

The jury returned guilty verdicts on both counts and found the enhancements true. The court conducted a court trial on the prior convictions and, based on certified prison records, found three of them true. The court denied Sahakian probation and sentenced him to a total term of 11 years.

Marsden Motion

On the date of the court trial on the prison priors and sentencing, Sahakian made a motion for substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and a motion for a new trial. He first indicated that he wished to make such a motion during the court trial on the prison priors, but the court did not let him address the court until after it had found the prior prison allegations true. Prior to sentencing, the court permitted Sahakian to address the court, at which time Sahakian stated, "I would like to have a new lawyer, so that I have filed a new motion for a new trial based on jury misconduct and ineffective assistance of counsel. The jury misconduct will be based upon the jurors consider to the judge asking if it was okay to agree with the other jurors. That ineffective assistance of the counsel would be based on my current lawyer refuse to object to the several instances of prosecutional [sic] misconduct, and his refusal to file a motion for a new trial based on jury misconduct. And I also explained to my lawyer how important it was for me to have two of my witnesses in court that they were there. He said his investigator spoke to them, one only spoke Chinese. Doesn't the court have [a] translator. I have never even met the investigator. I don't even know if there is anyone. So it is my constitutional right to have a witness under the 6th Amendment."

The court thanked him for his comments, and then summarily denied his motion for a new trial and a new lawyer. Sahakian's counsel asked if he could make a "couple of comments on that," and the court responded that it was "not necessary." Sahakian attempted to have the court reconsider, stating, "It's jury misconduct. No jury can raise their hands and say can I just agree with the rest of them."

Sahakian timely appealed.

DISCUSSION

Sahakian contends on appeal that the trial court erred in failing to question Sahakian and his counsel regarding the asserted bases for his *Marsden* motion. The three bases for his request for substitute counsel were his counsel's allegedly ineffective assistance in (1) failing to object to several alleged instances of prosecutorial misconduct; (2) failing to file a motion for a new trial based on jury misconduct "based upon the jurors consider to the judge asking if it was okay to agree with the other jurors"; and (3) failing to call two witnesses that had been interviewed by a defense investigator.

"The governing legal principles [derived from *Marsden, supra*] are well settled. 'Under the Sixth Amendment right to assistance of counsel, """[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""' [Citation.] Furthermore, """[w]hen a defendant seeks to discharge appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance."""' [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 95; see *People v. Smith* (2003) 30 Cal.4th 581, 604; *People v. Hart* (1999) 20 Cal.4th 546, 603.) If the defendant states facts sufficient to raise a question about his counsel's effectiveness, the court must question counsel as necessary to ascertain their veracity. (*People v. Mendez* (2008) 161 Cal.App.4th 1362 (*Mendez*), disapproved

on other grounds in *People v. Sanchez* (2011) 53 Cal.4th 80, 90, fn. 3; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1219.)

We generally review a trial court's decision denying a *Marsden* motion to relieve appointed counsel under the abuse of discretion standard. (*People v. Taylor* (2010) 48 Cal.4th 574, 599; *People v. Cole* (2004) 33 Cal.4th 1158, 1190.) The defendant must show that the failure to replace counsel would substantially impair the defendant's right to assistance of counsel. (*People v. Valdez, supra*, 32 Cal.4th at p. 95; *People v. Smith, supra,* 30 Cal.4th at p. 604.) This standard "applies equally preconviction and postconviction" (*People v. Smith* (1993) 6 Cal.4th 684, 694 (*Smith*)), because a defendant is entitled to competent representation at all times no matter the particular stage of the proceedings. (*Id.* at p. 695.) Where the *Marsden* motion is made after trial, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past*." (*Smith, supra,* 6 Cal.4th at p. 695.) In bringing a *Marsden* motion posttrial, the defendant bears the burden of establishing "that counsel can no longer provide effective representation, either for the purpose of sentencing or of making a motion for new trial based on incompetency of counsel." (*People v. Dennis* (1986) 177 Cal.App.3d 863, 871.) A denial of a motion under *Marsden* does not require reversal if the record shows that the error was harmless beyond a reasonable doubt. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349 (*Chavez*).)

I. *Trial Court's Duty to Inquire about Proposed Witnesses' Testimony*

With respect to the alleged incompetence of Sahakian's trial counsel in failing to object to alleged prosecutorial and juror misconduct, the trial court was well positioned to determine whether such misconduct had occurred and whether

the defense counsel may have been incompetent in failing to object. (*People v. Stewart* (1985) 171 Cal.App.3d 388, 396 (*Stewart*) ["In those instances where the alleged incompetence relates to events occurring at trial -- such as, to name just a few examples, a failure to object to evidence, weakness in legal argument, or a failure to vigorously cross-examine a witness -- the trial court is uniquely equipped to determine whether the defendant's claim has merit."], overruled on other grounds in *Smith*, *supra*, 6 Cal.4th at p. 693.) On the other hand, the trial court would not have known the substance of the testimony of the two witnesses that Sahakian claimed would support his defense. Sahakian contends that under *People v. Reed* (2010) 183 Cal.App.4th 1137 (*Reed*) and *Stewart*, the trial court was required to ask him and his counsel about the substance of the testimony to be given by his two proposed witnesses.

In *Reed*, at the sentencing hearing, the defendant attempted to bring a *Marsden* motion and a motion for a new trial based on his trial counsel's incompetence. (*Reed*, *supra*, 183 Cal.App.4th at p. 1142.) The trial court did not permit the defendant to state any of his reasons for claiming that his attorney was incompetent, and ruled that the defendant could only make the argument on appeal. (*Ibid.*) The appellate court found that the trial court should have permitted the defendant to make his motions for substitute counsel and for a new trial, and that the "complete absence of any record" regarding the bases for the motions required remand to the trial court for a full hearing. (*Id.* at p. 1148.)

In *Stewart*, the defendant was tried and convicted on charges of escape from jail, after he was found lying on the third floor roof of the jail, injured and calling for help. (*Stewart, supra*, 171 Cal.App.3d at pp. 391-392.) His defense at trial was that he suffered from a seizure disorder (a point not contested) and he claimed he had suffered a seizure which caused him to fall from the fifth floor of the jail onto

the roof below. (*Id.* at pp. 392, 397.) Following his conviction, the defendant made a motion for a new trial and requested that his allegedly incompetent trial counsel be replaced because he had "two witnesses on the fourth floor" who should have been called to testify to support his defense. (*Id.* p. 398.) The trial court ruled that his motion was frivolous and unsupported. (*Id.* at p. 394.) However, the court of appeal found that the trial court had not satisfied the requirements of *Marsden* because it did not inquire into the substance of the witnesses' expected testimony to determine whether it "might have been material or even crucial." (*Id.* at p. 398.)

Mendez similarly involves a trial court's failure to inquire about the expected testimony of proposed defense witnesses after the defendant brought a *Marsden* motion. At the defendant's sentencing hearing after he and a codefendant were convicted of assaulting a fellow inmate in prison, his trial attorney informed the court that the defendant was making a new trial motion on the basis of incompetent representation of counsel. (*Mendez, supra*, 161 Cal.App.4th at p. 1365.) The defendant complained that there were eight witnesses to the assault but none were called in his defense, and his counsel failed to introduce other exculpatory evidence, including recordings of telephone calls. (*Id.* at pp. 1365-1366.) The trial court asked what the witnesses would have testified, and the defendant "identified by name two prospective witnesses who stated there was only one assailant, not two. He informed the trial court that one prospective witness told the district attorney he (Mendez) was not involved in the attack, but his trial attorney failed to call that person as a witness, and that the other prospective witness likewise characterized the assault as a 'one-on-one,' but his trial attorney 'never subpoenaed or questioned' that person, either." (*Id.* at p. 1367.) The trial court cut off his attempts to provide further explanation and appointed new counsel to represent

him for the sole purpose of investigating whether there was a basis for a motion for new trial based on incompetency of counsel. (*Id.* at p. 1366.) The new counsel found no basis for the motion, the trial court terminated the appointment of the new attorney, and the defendant's original trial attorney represented him at sentencing. (*Ibid.*) On appeal, the court held that the trial court had failed to comply with the requirements of *Marsden* because it did not allow the defendant to explain the causes of his dissatisfaction with his counsel and did not allow the defendant's attorney to respond. (*Mendez, supra*, 161 Cal.App.4th at pp. 1367-1368.)

In Sahakian's case, the trial court permitted him to state, in general terms, his complaint that defense counsel had not called two witnesses to testify, and that one of them allegedly was not called because he only spoke Chinese. *Reed* is thus distinguishable, because the trial court in that case did not permit the defendant to bring a *Marsden* motion at all, and thus the defendant had no opportunity to articulate any complaints about his counsel's performance, even in the most general fashion. (*Reed, supra*, 183 Cal.App.4th at p. 1148.) *Stewart* and *Mendez* are more on point, in that the defendants in those cases contended that material witnesses were not called to testify at trial, and, as here, the trial court failed to probe the defendants or their counsel regarding the substance of those witnesses' testimony.

However, while the *Stewart* and *Mendez* decisions do not reflect that the proposed witnesses in those cases had been interviewed by a defense investigator or by defense counsel, Sahakian told the trial court that his two witnesses had been vetted by an investigator. It is well-established that trial counsel in a criminal case is the "'captain of the ship'" and has the discretion to select the witnesses who will testify at trial and to make the decisions concerning the presentation of evidence in defense. (*People v. Roldan* (2005) 35 Cal.4th 646, 682, disapproved on another

ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Welch* (1999) 20 Cal.4th 701, 728-729; *People v. Williams* (1970) 2 Cal.3d 894, 905.) In some cases, the admission that the witnesses had been vetted by an investigator and determined to be unsuitable would be a sufficient basis to deny a *Marsden* motion based on counsel's alleged incompetence in failing to call the witnesses.

Here, however, Sahakian alleged that his defense counsel decided not to call one of the vetted witnesses merely because he or she did not speak English. If this allegation were true (a question to which we do not know the answer because counsel was not permitted to respond), the general rule affording counsel discretion to determine criminal trial strategy would not apply. In other words, a decision not to call a witness with crucial testimony merely because he or she did not speak English could form the basis of a successful ineffective assistance attack. (*Stewart, supra,* 171 Cal.App.3d at p. 398.) In any event, we need not decide whether the trial court in this case failed to adequately comply with the requirements of *Marsden*, because we conclude that any error in conducting the *Marsden* hearing was harmless.

II. *Prejudice to Sahakian*

Sahakian contends that reversal and remand for a full *Marsden* hearing is required because "[w]e do not know what a full hearing would have revealed," since he did not have the full opportunity to call defense witnesses or to develop a motion for a new trial, and "had to proceed to sentencing represented by appointed counsel he had had dissatisfaction with from early in the case." (See *Mendez, supra*, 161 Cal.App.4th at p. 1368 [inadequate *Marsden* inquiry regarding counsel's failure to call witnesses was prejudicial error because "[h]ad the trial court complied with *Marsden*'s requirements, Mendez 'might have catalogued acts

and events beyond the observations of the trial judge to establish the incompetence of his counsel.'") The failure to satisfy the standard articulated in *Marsden* and its progeny does not require reversal where the record shows beyond a reasonable doubt that the defendant was not prejudiced. (*Chavez, supra*, 26 Cal.3d at pp. 348-349; *People v. Washington* (1994) 27 Cal.App.4th 940, 944 (*Washington*) [defendant must show "either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted."]) We find that Sahakian suffered no prejudice even if the trial court failed to conduct a sufficient *Marsden* inquiry.

Washington is particularly instructive. In that case, the trial judge never conducted a *Marsden* hearing, but the appellate court concluded that the error was harmless. (27 Cal.App.4th at p. 944.) The court reasoned as follows: "Washington has made no showing here either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted. The failure to rule on the motion did not affect Washington's trial in any way. The motion was made only *after* he had been convicted. The basis for such a motion at such a time could have been only that his attorney had acted incompetently at trial or in filing the motion for new trial [citation] or, possibly, that Washington believed that counsel would be unable to represent him properly at sentencing. The fact that no *Marsden* motion was entertained does not preclude Washington from attacking the competency of his attorney. Indeed, we have reviewed counsel's actions under the standards stated in *People v. Babbitt* (1988) 45 Cal.3d 660, 707, and conclude that no grounds for claiming ineffective assistance of counsel exist. Washington was ably represented and the evidence against him was nothing less than overwhelming. We cannot see how the appointment of a different attorney would

have gained Washington a new trial, or could have had any effect on the sentence imposed, and we, of course, are able to review Washington's claims that the sentence imposed was improper. We therefore conclude that the failure to consider the purported *Marsden* motion has not deprived Washington of any arguments or otherwise irrevocably affected the verdict or sentence. Under the circumstances, and on the record before us, we cannot see that Washington would have obtained a result more favorable to him had the motion been entertained." (*Washington*, *supra*, 27 Cal.App.4th at p. 944.)

Similarly, Sahakian made his request for substitute counsel only after he was convicted. Had his *Marsden* request been granted at that juncture, the only conceivable alternate outcomes would have been the following: (1) the court could have found the allegations as to Sahakian's prior prison terms not true, thereby leading to a lesser sentence; (2) the base sentence could have been lighter, or (3) the new appointed attorney could have successfully moved for a new trial based on prosecutorial or juror misconduct or ineffective assistance of counsel due to the failure to call two witnesses. On this record, none of these outcomes is plausible.

First, the trial court concluded that Sahakian had been sentenced to prior prison terms purely based on certified prison records. It is not reasonably possible that the efforts of substitute counsel could have led a different result.

Second, it is not plausible that a new attorney could have been more successful than the trial counsel in seeking to reduce the sentence. The trial court imposed the upper term with respect to Sahakian's base sentence despite the fact that trial counsel argued that the court should impose the middle term. The trial court did so because of the presence of numerous aggravating factors, including Sahakian's criminal history and the fact that Sahakian "absolutely lied on the witness stand." The probation report before the trial court revealed more than 15

criminal convictions for numerous crimes, including a number of felonies, and further revealed that the defendant was on probation or parole at the time he committed the current offenses. The probation report listed five aggravating circumstances in total, and no circumstances in mitigation. Further, as alluded to by the trial court, on the stand Sahakian presented a wholly unlikely scenario in which Chevez ran into the knife in Sahakian's hand as he stood motionless, and, in essence, cut himself on the face. It is not realistic to conclude that a new attorney appointed at that juncture could have affected the sentence.

Finally, it is not reasonable to suppose that a new attorney could have brought a successful motion for a new trial. Notably, Sahakian has not appealed the denial of his own motion for a new trial. And, as discussed above, the record does not support any claim of prosecutorial or juror misconduct. With respect to the failure to call two witnesses to support Sahakian's defense, we note that the evidence of Sahakian's guilt was overwhelming and his version of events, even if somehow corroborated by two additional witnesses, was unlikely to raise any doubt of guilt. (See *Washington, supra*, 27 Cal.App.4th at p. 944.)

Sahakian has made no showing on appeal that his counsel was ineffective or that he would have obtained a more favorable result had his *Marsden* motion been granted. He was ably represented and the evidence against him was overwhelming. In sum, Sahakian was not prejudiced by the trial court's failure to conduct a full *Marsden* inquiry regarding the substance of the testimony by his two proposed witnesses.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.